No. 80-1259

# In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN VON BARTA, III, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

Page

Cases:

*Finch* v. *United States*, 433 U.S. 676 ..... 4

*Serfass* v. *United States*, 420 U.S. 377 ..... 3

*United States* v. *MacDonald*, 435 U.S. 850 ..... 5

Statutes and rule:

18 U.S.C. 1341 ..... 1
18 U.S.C. 1343 ..... 1
18 U.S.C. 3731 ..... 2
Fed. R. Crim. P. 48 ..... 3

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

No. 80-1259

JOHN VON BARTA, III, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner contends that the court of appeals had no jurisdiction to hear the government's appeal from an order dismissing the indictment and that the federal mail and wire fraud statutes do not encompass his scheme to defraud his employer.

1. Petitioner was indicted in the United States District Court for the Southern District of New York under 18 U.S.C. 1341 and 1343. The indictment alleged that petitioner, a salesman and bond trader employed by a small securities firm, had engaged in mail and wire fraud by establishing a corporation and causing his employer to engage in transactions for the account of that corporation. Petitioner allegedly failed to reveal to his employer that the corporation had insufficient assets to cover its trades and also failed to disclose his interest in the corporation.

Petitioner moved to dismiss the indictment on the ground that it failed to allege a "scheme or artifice to defraud." In resisting the motion to dismiss, the prosecutor described some of the facts that he expected to prove at trial (Pet. App. 19a-20a, 26a). Thereafter, the district court refused to dismiss the indictment because "the Government may well prove a *prima facie* case based on material misrepresentations concerning [the newly created corporation] and resulting monetary loss on bond trades [to petitioner's employer] and gain to * * * [petitioner] * * *." It stated, however, that if the government did not intend to go to trial on that theory, it would grant a pretrial motion to dismiss (*id.* at 25a-26a).

The prosecutor moved for reargument on the ground that the district court had adopted a legal theory to sustain the indictment different from that urged by the prosecutor. He advised the district court by letter that he would proceed to trial only on the legal theory set forth in the indictment—that petitioner and a co-conspirator "violated and caused each other to violate the duties of honesty and loyalty which they owed to their respective employers." The government asserted that such conduct, together with certain false statements, concealments, and nondisclosures, caused their employers to suffer both tangible and intangible losses (Pet. App. 16a-17a). Petitioner opposed the government's motion for reargument, contending, *inter alia*, that it constituted a motion by the government, in improper form, for dismissal of the indictment. The district court rejected petitioner's contention, observing that the letter merely clarified the government's legal position and that, if the letter previously had been before the court during the briefing on petitioner's dismissal motion, the court would have dismissed the indictment.

The district court thereupon entered an order dismissing the indictment (Pet. App. 18a). The government appealed pursuant to 18 U.S.C. 3731, contending that the indictment

charged a "scheme or artifice to defraud." The court of appeals agreed and remanded the case for further proceedings (Pet. App. 1a-13a).

2. Petitioner's initial contention (Pet. 7-8) that the court of appeals lacked jurisdiction to hear the government's appeal was properly rejected in the opinion of the court of appeals, on which we rely (see Pet. App. 6a-8a). The government did not move to dismiss the indictment, as petitioner contends. Rather, it sought reargument of the district court's ruling because the district court had misinterpreted the legal theory on which the government based the indictment. When the government advised the court that it had misconstrued the theory of the indictment, the court changed its ruling. By no stretch of the imagination was the government filing a motion to dismiss the indictment under Fed. R. Crim. P. 48. To the contrary, the government sought to convince the district court that the indictment was fully sustainable on the legal theory set forth in the indictment.

There is no substance to petitioner's alternative argument (Pet. 8-10) that the district court's ruling constituted a non-appealable factual finding that the government's evidence was insufficient to sustain a conviction. At no point did the government present its evidence. And at no time was petitioner placed in jeopardy or acquitted. See Pet. App. 6a-8a & nn. 8-10. Therefore, even were petitioner correct that the district court's action amounted to a pretrial acquittal, the government's appeal would not be barred. *Serfass* v. *United States*, 420 U.S. 377 (1975). In any event, contrary to petitioner's suggestion, the district judge did not resolve any disputed issues of fact simply by referring to an informal bill of particulars proffered by the government (see Pet. App. 4a, 6a-7a, & n.8). The district court's ruling, in form and in substance, was that, in light of the facts alleged in the indictment and as set forth by the prosecutor in the informal

bill of particulars, the indictment did not charge a scheme to defraud punishable under the mail fraud and wire fraud statutes (Pet. App. 17a-18a).[1]

3. Petitioner's arguments on the scope of the mail and wire fraud statutes (Pet. 10-13) invite the Court to grant interlocutory review of a pretrial decision sustaining the indictment. The ruling of the court of appeals places petitioner in precisely the same position he would have occupied if the district court had declined to dismiss the indictment. Under those circumstances, petitioner would have no right to interlocutory review. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted and his conviction is upheld on appeal, he will then be able to present all of his contentions to this Court in a petition for a writ of certiorari seeking review of a final judgment against him. We submit, therefore, that review by this Court of the decision of the court of appeals would be premature.

Beyond this, the indictment in this case was dismissed on May 12, 1980, and petitioner's trial is being postponed pending possible review by this Court. There is no sound

---

[1] *Finch* v. *United States*, 433 U.S. 676 (1977), which may not have survived subsequent double jeopardy decisions of this Court, is in any event not relevant in this situation. In *Finch*, the defendant was placed in jeopardy when the parties in a nonjury case entered into a stipulation setting forth the operative facts. This effectively obviated the need for a trial. The trial court's ruling, dismissing the indictment based on the stipulation of facts, therefore came at the end of the trial. In the present case, not only was petitioner never placed in jeopardy, but neither party at any point indicated an intention to stipulate the facts (see Pet. App. 6a n.7), to waive a jury, or to permit the district court to enter a final verdict on the issue of guilt or innocence at this preliminary stage.

reason for extending the pretrial delay that already has occurred in this case. See, *e.g., United States* v. *MacDonald*, 435 U.S. 850, 853-854, 863 (1978).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

FEBRUARY 1981

---

[2]Because the court of appeals' decision reinstating the indictment is interlocutory, we have not responded to petitioner's substantive claims concerning the scope of the federal mail and wire fraud statutes. If the Court wishes us to provide argument in support of the court of appeals ruling (Pet. App. 8a-13a), we will do so in a supplemental memorandum.